

FILED

JAN 05 2011

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

NO. 290735

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DIVISION III

KELLY JAMES PAULLUS and TRISTA SOPHIA PAULLUS,
individually and as a marital community, and GEOFFREY MICHAEL
MITCHELL, individually,

Appellants,

v.

COUNTY OF YAKIMA,

Respondent.

BRIEF OF RESPONDENT COUNTY OF YAKIMA

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Lawrence A. Peterson, WSBA No. 14626
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A. **RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR.**

1. Plaintiffs argued below that the facts were "undisputed" as to all issues raised. The trial court properly determined on summary judgment that Plaintiffs' Claim did not comply with Chapter 4.96 RCW and properly determined that Yakima County had not waived the defense of Plaintiffs' failure to comply with Chapter 4.96 RCW.

2. Whether compliance with the content requirements of RCW Chapter 4.96 and waiver of the affirmative defense of statutory compliance, based upon undisputed facts, is a question of law for the Court.

3. Whether compliance with the content requirements of RCW Chapter 4.96 is to be determined solely from the four corners of the claim.

4. Whether a complete absence of any description of tortious conduct by a municipality in a claim submitted under RCW Chapter 4.96 fails to comply with the statutory requirements.

5. Whether mere inaction/inactivity by a defendant can constitute waiver of the defense of Plaintiffs' failure to comply with Chapter 4.96 RCW.

B. COUNTER STATEMENT OF THE CASE.

This appeal involves a September 2, 2005 motor vehicle accident. (CP 108-112). On April 4, 2008, Plaintiffs filed a damage claim (the "Claim") under RCW 4.96.020 against Yakima County (the "County"). On August 12, 2008, Plaintiffs filed suit, and served the County with the summons and complaint (the "Complaint") on August 22, 2008. (CP 25, 108). The three-year statute of limitations ran on September 2, 2008.

Plaintiffs' Claim failed to describe how the County caused and should be responsible for their injuries. Despite over 2 1/2 years having passed since the accident, Plaintiffs' Claim, merely stated:

On September 2, 2005 at approximately 12:54 PM Jacob DePauw was driving a work van provided by his employer Michael Durnal with Durnal Construction traveling northbound on Konnowac Pass. DePauw lost control of the van hitting a 25' guardrail. The guardrail split in half and pierced through the van. Claimants Kelly J. Paullus and Geoffrey M. Mitchell were riding in the back of the van and suffered personal injury. Claimant, Trista Sofia Paullus, is Kelly Paullus' wife. Trista Sofia Paullus has assisted Kelly Paullus with his medical recovery.

(CP 100). The Claim makes no allegation describing any tortious County conduct that brought about Plaintiffs' injuries. The Claim failed to describe how or why the vehicle lost control, how or why the guardrail split, or how or why the County was liable in tort. There was no statement that the guardrail was designed, installed, maintained or owned by the

County (as opposed to a private party).¹ The Claim failed to describe how the guardrail was involved in, or contributed to, any injury. Unlike their Complaint filed on August 12 (CP 108-111), Plaintiffs' Claim did not describe any negligent design, maintenance, operation, or management of the guardrail by the County. (CP 100).

On May 29, 2008, in response to an inquiry from Plaintiffs' attorneys' staff, Plaintiffs were notified by a County paralegal that the County did not have the guardrail or any photos of the accident scene. The County paralegal also requested copies of Plaintiffs' treatment records. (CP 55). A second letter dated July 22 reiterated the County's request "to assist in our review of this claim." (CP 56). Plaintiffs failed to respond to either County request. (CP 25). The County took no action on Plaintiffs' claim. (CP 25).

On August 22, 2008, Plaintiffs served their Complaint on the County. (CP 25). The Complaint contained general, nonspecific allegations of negligent design, maintenance, operation and management of the guardrail. (CP 110, pars. 2.4, 2.6).

¹ Plaintiffs argue for the first time on appeal that judicial notice may be taken of the ownership of the roadway and the guardrail. (App. Brief. pp. 20-22). "Matters not argued at the trial level may not be argued on appeal." Lewis vs. Mercer Island, 63 Wn. App. 29, 31, 817 P.2d 408 (1991). In any event, the ownership of roadways and adjacent properties is not a proper subject of judicial notice. Martin vs. Commonwealth, 556 A.2d 969, 972 (Pa. 1989).

On September 23, 2008, Deputy Yakima County Prosecuting Attorney Lawrence Peterson appeared for the County (CP 25, 105).

After Mr. Peterson appeared, Plaintiffs did nothing to prosecute their case, e.g., to inquire by telephone or letter when the County would answer the Complaint, to require an answer by motion for an order of default, to conduct any discovery, to otherwise ascertain the nature and basis of any County defenses, or to explore settlement. (CP 25-26). The only activity was an isolated September 29, 2008 phone call between County attorney Peterson and Plaintiffs' attorney Christopher Childers. (CP 25-26, 72-73).

Mr. Peterson wanted to learn what Mr. Childers was willing to tell him about the liability theory against the County "as the damage claim provided no information in that regard." (CP 25). Mr. Childers provided a nonspecific, general assertion that the guardrail had been improperly "designed, installed or maintained." (CP 25, 72-73). Mr. Childers revealed Plaintiffs had a consulting expert (identity and opinions not disclosed). (CP 73). Mr. Childers stated he intended to issue discovery and depose two County personnel identified by Mr. Peterson. (CP 72-73; RP 14 ll. 6-

8).² In Mr. Peterson's mind it was not clear how Plaintiffs could show their injuries were caused by the guardrail. (CP 25).

This single phone call took place after September 2, 2008, the last day for filing a claim that complied with RCW 4.96.020. Plaintiffs' assertion the County was proceeding "as though it was litigating the claim for almost 2 years" (App. Brief pp. 1-2) is a gross mischaracterization. Notwithstanding their stated intent to conduct discovery, Plaintiffs never requested the County's answer, not to mention that they never moved for default, scheduled no depositions, issued no discovery, and otherwise made no inquiry concerning defenses. (CP 25-26). Neither did the County issue or conduct any discovery. (CP 25-26). In fact, no activity of any kind on the claim against the County took place for over 14 months until the County associated additional counsel on December 10, 2009. (CP 103).

The County's summary judgment motion was filed February 8, 2010, asserting failure to comply with the tort claims statute because of the absence of any description of tortious conduct by the County which caused Plaintiffs' injuries. (CP 80-92, 101). Only after the motion was filed and served did Plaintiffs request an answer to the Complaint. (CP 61). The

² Plaintiffs' assertion (App. Brief p. 7) that the name of plaintiffs' consulting expert was disclosed, and the implication that the County had formally "designated witnesses" misstates the record.

County's answer asserted failure to comply with the claim statute, RCW Chapter 4.96. (CP 79).

In their response to the County's summary judgment motion, Plaintiffs offered no evidence that they had relied upon statements or other actions by the County to their detriment. (CP 38-40, 72-74). In fact, during oral argument Plaintiffs disclaimed any improper motives by the County's counsel: "And we think it's clear from Mr. Peterson's declaration that he personally did not intentionally lie in wait until after the statute of limitations ran in this case." (RP 15, ll. 1-3). Plaintiffs provided no explanation of their inactivity. Furthermore, Plaintiffs submitted no evidence or argument claiming they had invested substantial time and effort in the case that could have been avoided had the County's defense of Plaintiff's failure to comply with RCW 4.96.020 been raised earlier.

The order granting summary judgment was entered May 6, 2010. (CP 9-10).

C. **PLAINTIFFS' BRIEF CONTAINS ASSERTIONS NOT SUPPORTED BY THE RECORD THAT SHOULD BE DISREGARDED.**

Plaintiffs assert, without any support in the record, the nature of the injuries allegedly sustained. (App. Brief p. 4). As such these assertions should be disregarded. Sherry vs. Financial Indemnity, 160 Wn.2d 611,

615, n.1, 160 P.3d 31 (2007); RAP 10.3(6). This is an improper attempt to gain the Court's sympathy. The nature of the injuries sustained is irrelevant to the issues on this appeal.

Plaintiffs make other unsupported assertions that are addressed below in the context of the County's response to Plaintiffs' arguments.

D. THE TRIAL COURT PROPERLY GRANTED SUMMARY JUDGMENT AS THERE WERE NO GENUINE ISSUES OF MATERIAL FACT.

1. General Summary Judgment Standard of Review.

Summary judgment is reviewed de novo. Hisle vs. Todd, 151 Wn.2d 853, 860, 93 P.3d 108 (2004). A motion for summary judgment is appropriate whenever the pleadings, other records on file, and affidavits show there is no genuine issue as to any material fact, and that the moving party is entitled to judgment as a matter of law. CR 56(c); Teagle vs. Fisher, 89 Wn.2d 149, 152, 570 P.2d 438 (1977). Upon submission by the moving party of sufficient affidavits or other evidence, the non-moving party must set forth specific facts that sufficiently rebut the moving party's contention and disclose the existence of a genuine issue of material fact. Young vs. Key Pharmaceuticals, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). A summary judgment order is appropriate when only issues of law are presented and there are no material issues of fact. See, Seattle-First vs.

Westlake Park, 42 Wn. App. 269, 271, 711 P.2d 363 (1985). "On review of an order granting or denying a motion for summary judgment the appellate court will consider only evidence and issues called to the attention of the trial court." RAP 9.12. " '[N]ew' argument[s]" will not be considered. Rahman vs. State, 150 Wn.App. 345, 358-359, 208 P.2d 566 (2009).

2. Summary Judgment Was Appropriate As to Plaintiffs' Failure to Comply With the Claim Statute and Waiver.

Plaintiffs cite no authority for the proposition that summary judgment was improper. When the material facts are undisputed, compliance with the claims statute is a question of law for the Court. "The process of applying the law to the facts ... is a question of law." Tapper vs. State, 122 Wn.2d 397, 403, 731 P.2d 1121 (1987); Renner vs. City of Marysville, 168 Wn.2d 540, 545, n. 1, 230 P.3d 569 (2010) ("The facts are undisputed in the case before us, so the sole question is whether Renner substantially complied with the claim filing statute."). The cases cited by the parties all appear to decide this issue as a matter of law where the facts, as here, are undisputed.

While waiver is a mixed question of law and fact, where the facts are undisputed the issue of waiver is a question of law. Brundridge vs. Fluor, 164 Wn.2d 432, 440-441, 191 P.3d 879 (2008).

In the trial court Plaintiffs asserted "the facts underlying this claim are undisputed." (CP 27). Plaintiffs' new and inconsistent arguments on appeal that genuine issues of material fact preclude summary judgment on the statutory compliance and waiver issues (App. Brief pp. 4, 30-32, 37-38) cannot be considered. Lewis, 63 Wn. App. at 31; Kohl vs. Zemiller, 12 Wn.App. 370, 373, 529 P.2d 861 (1974).

E. THE REQUIREMENTS OF THE TORT CLAIMS STATUTE ARE MANDATORY; PREJUDICE IS NOT A FACTOR.

"Filing a claim for damages within the time allowed by law shall be a condition precedent to the commencement of any action claiming damages." RCW 4.96.010(1). "No action shall be commenced against any local governmental entity ... for damages arising out of tortious conduct until 60 days have elapsed after the claim has first been presented to and filed with the governing body thereof." Former RCW 4.96.020(4). The claim for damages "must" contain the required information. Former RCW 4.96.020(3) (all references herein to RCW Chapter 4.96 are to the version of the statute in effect on April 4, 2008; no reference is made to the 2009 changes effective July 26, 2009, which do not apply to this claim filed in 2008).

The legislature may properly set conditions precedent to maintain a tort action against a municipality:

[T]he information required is for the county's consideration of the claim. There can be no interrogatories and depositions until the County has rejected the claim and then action has been commenced. Further, the right to sue the state, a county, or other state-created governmental agency must be derived from the statutory enactment; and it must be conceded that the state can establish the conditions which must be met before that right can be exercised.

...

The statutes requiring claims to be presented to that board declare a rule of policy, and the courts are not at liberty to ignore it, even though they might be persuaded in a particular case that it was a useless ceremony.

...

... The inescapable logic of these rules, as just stated, when taken together, is that substantial compliance with the statute is a condition precedent to the maintenance of an action for damages against the municipality; or, expressed in another way, the filing of a claim which does not substantially comply with the statute has the same legal effect as a failure to file any claim at all.

Nelson vs. Dunkin, 69 Wn.2d 726, 729-730, 419 P.2d 984 (1966) (emphasis original). The required information items are "not, as some argue, the archaic requirement of another day and generation to be disregarded in this day of interrogatories and depositions." Nelson, 69 Wn.2d at 729. Prejudice to the municipality from failure of the claim to comply with the statute is not a factor and is irrelevant and immaterial. Id. at 729-730 (noncompliant claim mandated dismissal notwithstanding "complete investigation of all facts relative to the collision" had been made); Pirtle vs. Spokane, 83 Wn.App. 304, 310, 921 P.2d 1084 (1996).

F. **SUBSTANTIAL COMPLIANCE WITH THE TORT CLAIM STATUTE IS REQUIRED.**

The purpose of the statute is to provide all required information so as to allow for an informed and reasoned evaluation of the claim.

While we recognize that the statute sets forth a substantial compliance standard for the content of a claim, we must apply the Legislature's liberal construction directive in a manner that promotes the purpose of the claim filing statutes. It is generally accepted that one of the purposes of the claim filing provisions is to allow government entities time to investigate, evaluate, and settle claims. . . . The Legislature did not intend that RCW 4.96.010 be applied to mean that the content of a claim should be read so broadly as to negate the purpose of RCW 4.96.020(4), and we decline to do so.

Medina vs. PUD No. 1 of Benton County, 147 Wn.2d 303, 310, 53 P.3d 993 (2002) (rear-end collision by PUD vehicle; claim for property damage insufficient to preserve claim for personal injury). "It is not enough that a claim be filed. While we have frequently said that statutory provisions respecting the presentation of a damage claim for torts against a municipal corporation are to be liberally, and not literally, construed, we have always proceeded upon the principle, regardless of the issue of prejudice, that there must be substantial compliance." Nelson, 69 Wn.2d at 730.

"[R]equired information which is totally absent from the claim 'cannot be supplied by any method of construction, however liberal.'" Renner vs. City of Marysville, 145 Wn.App. 443, 452, 187 P.3d 283 (2008), affirmed,

168 Wn.2d 540, 230 P.3d 569 (2010) (quoting Brigham vs. Seattle, 34 Wn.2d 786, 789, 210 P.2d 144 (1949)).

G. THE CLAIM MUST DESCRIBE TORTIOUS CONDUCT.

Former RCW 4.96.020(3), applicable to this case, provides "all claims for damages arising out of tortious conduct must":

-“locate and describe the conduct and circumstances which brought about the injury or damage”,

-“describe the injury or damage”,

-“state the time and place the injury or damage occurred”,

-“state the names of all persons involved, if known, and

-“shall contain the amount of damages claimed, together with a statement of the actual residence of the claimant at the time of presenting and filing the claim and for a period of six months immediately prior to the time the claim arose.”

(Emphasis added). The "conduct" referenced in RCW 4.96.020(3) is not the conduct of the claimant, but the "tortious conduct" of the local government. Harberd vs. Kettle Falls, 120 Wn.App. 498, 510-511, 84 P.3d 1241 (2004). "If the claimant alleges 'damages arising out of tortious conduct,' the damages claim must set forth specific facts outlined in the statute." Harberd, 120 Wn.App. at 510 (emphasis added). At a minimum an "accurate and complete description" of "the nature" of the tortious conduct is required. See, Renner vs. City of Marysville, 168 Wn.2d 540,

547-548, 230 P.3d 569 (2010). The requirements of RCW 4.96.020(3) are mandatory and in the conjunctive. All required elements must be present; the absence of any required element is fatal. See, Acheson vs. ESD, 19 Wn.App. 915, 920, 579 P.2d 953 (1978) (statutory requirements in the conjunctive are all required).

H. PLAINTIFFS' CLAIM FAILED TO DESCRIBE ANY TORTIOUS CONDUCT BY YAKIMA COUNTY, AND THEREFORE FAILED TO SUBSTANTIALLY COMPLY.

Plaintiffs' brief discusses information they provided with regard to claim notice elements (App. Brief pp. 5-6, 17-18, 22). Such information does not satisfy the crucial statutory requirement to describe the "tortious conduct" of the County. It is self-evident that providing one required element does not supply a different required element.

Plaintiffs' Claim absolutely fails to describe any "tortious conduct" by the County. No wrongful conduct is anywhere described. The Claim:

-fails to claim that the County was negligent;

-fails to identify any tortious conduct (acts or omissions) on the part of the County;

-fails to identify any defect caused by the County or for which the County was responsible;

-fails to even claim or describe negligent or improper design, maintenance, operation or management (in contradistinction to the Complaint later filed).

Plaintiffs' Claim states only that the vehicle in which two of the Plaintiffs were passengers went out of control and struck a guardrail that split in half and pierced the van. The Claim makes no statement regarding how or why the vehicle went out of control or the guardrail split. Most importantly, the Claim makes no statement that any critical event was caused by any act or omission of the County. The Claim does not even allege that the guardrail was owned or controlled by the County or located on County property or right-of-way, as opposed to being a private guardrail located adjacent to a County road. The Claim fails to describe any reason why the County should be liable for Plaintiffs' injuries. Nothing stated in the Claim gave the County notice of the nature of any tortious conduct Plaintiffs' believed the County was responsible for. Consequently, the Claim did not fulfill the fundamental statutory purpose of putting the County in a position to evaluate whether to settle or deny the Claim.

Other Washington cases applying the "substantial compliance" standard illustrate the insufficiency of Plaintiffs' Claim. In Caron vs. Grays Harbor County, 18 Wn.2d 397, 139 P.2d 626 (1943), the plaintiff was injured utilizing a rolling ladder in a county records vault. Id. at 399-401. The county commissioners had received complaints about the condition of the vault, including the "rickety condition of the ladder." Id.

at 401. While on the ladder accessing a file drawer, the ladder slipped and the plaintiff lost her balance, clung to a file drawer which gave way, and fell. Id. at 401-402. The written claim submitted to the county stated:

... Blanche Caron hereby presents a claim to said County for damages to the person of said Blanche Caron, caused from a fall while carrying on her general duty as an abstractor while searching files in the vault of the clerk's office of said county, on April 22, 1940. Said Blanche Caron was on a ladder extracting a file case when the case failed to hold causing the ladder to slip and the said Blanche Caron to fall and injure her back....

18 Wn.2d at 404. The claims statute at the time required "all such claims for damages must locate and describe the defect which caused the injury, describe the injury, and contain the amount of damages claimed...." Id. at 403 (emphasis original). The claim was held legally insufficient (affirming judgment NOV and dismissing the plaintiff's action):

It will be observed... that the claim as presented merely stated that the *file case failed to hold*, causing the ladder to slip, but described no *defect* in either the file case or the ladder...

In her complaint, served and filed long after the expiration of the time allowed for presenting a proper claim in this instance, appellant alleged that the respective defendants were negligent in failing to furnish her with a safe place in which to examine files; in allowing the ladder to become loose on the track and out of repair; in maintaining a highly polished floor where the wheels of the ladder might, and did, slip, causing appellant to fall and injure her back; and in failing to provide adequate space, between the ladder and filing cabinets, for appellant and others to ascend and

descend the ladder without having their backs injured on the sharp edges of the filing cabinets....

It is apparent that the claim as filed did not comply with the essential requirements of the statute above set forth, and appellant frankly concedes that the claim was defective in that it did not state the amount of damages claimed and did not set forth "in detail the defect which caused the accident." It is also apparent that the defects and acts of negligence upon which appellant based her cause of action, as set forth in her complaint, are radically different from the verified claim which was originally presented on her behalf by the county auditor....

It is definitely settled in this state that the filing of a claim in accordance with [the claims filing statute] is a condition precedent to the maintenance of an action for damages against a county. [Citations omitted]. As stated in the Shaw Supply Co. case, supra:

The statutes requiring claims to be presented to that board declare a rule of policy, and the courts are not at liberty to ignore it, even though they might be persuaded in a particular case that it was a useless ceremony.

Although we have frequently said that statutory provisions respecting the presentation of claims for torts against a municipality are to be liberally construed, we have always preceded upon the principle that there must be a *substantial* compliance with such requirements.[Citations Omitted]. In the Sopchak case, supra, we said:

Data not already included therein in some form cannot be supplied by any method of construction however liberal.

The inescapable logic of these rules, as just stated, when taken together, is that *substantial* compliance with the statute is a condition precedent to the maintenance of an

action for damages against the municipality; or, expressed in another way, the filing of a claim which does not substantially comply with the statute has the same legal effect as a failure to file any claim at all.

Caron, 18 Wn.2d at 404-406 (italics original, emphasis added).

To the same effect is Hanan vs. City of Wenatchee, 117 Wash. 279, 201 P. 5 (1921), where plaintiff was injured on a sidewalk and the damage claim stated "personal injuries caused by defective sidewalk located on the northerly side of Yakima street about 80 feet westerly of the intersection of Yakima street with Oregon street...". Id. at 280. The applicable claims statute was the same as in Caron. Id. at 281. The claim was held to be insufficient:

It is objected that it does not accurately locate and describe the defect that caused the injury; in fact, does not describe the defect at all. This is the principal question presented on the appeal, and is the only question we have found it necessary to notice.

...

Turning to the claim here in question, it seems to us to be at once apparent that there is no description of the defect which caused the injury. The recital is that the injury was caused 'by defective sidewalk located on the northerly side' of a named street. This is not to accurately describe a defect; it is but to state a general ground on which a recovery can be predicated. Plainly, therefore, there was no compliance with the technical requirement of the statute. We think, furthermore, that there was not a compliance with the purposes and intent of the statute. Statutes of this sort have a number of purposes. One of these is to give the municipal officers notice of the nature of the defect which

caused the injury on which the claim for damages is founded in order that they may pay or otherwise settle the claim before the municipality is mulct in costs. This right is denied them unless the particular defect is pointed out to them. It is a matter of common knowledge that many of the sidewalks in municipalities are defective in some respects; in fact it is common knowledge that few, if any, of them are perfect. Not all of these defects, however, will give rise to a cause of action, even though they cause an injury. To say, therefore, that a sidewalk is defective at a particular place and that the defect caused an injury, without anything more, does not give the city that information the law contemplates it should have before suit is instituted against it.

Hanan, 117 Wash. at 281-282; see, also, Mears vs. City of Spokane, 22 Wash. 323, 325-326 (1900) (sidewalk fall; ordinance required description of "cause and nature" of the injuries. Held: notice of claim merely reciting "caused by defects and obstruction in the sidewalk . . . caused by the carelessness and negligence of the said city" did not adequately state the cause of the injury: "To state that the injury was caused by a defect and obstruction in the sidewalk is but to state the general ground upon which a city in every case is liable for injuries sustained upon its streets, but it states no cause for the particular injury. The charter provision is intended to require notice to be given of the cause of the particular injury, and a notice that fails to do so cannot be made the basis of an action against the city for personal injuries."). Compare, Culp vs. Tekoa, 143 Wash. 367, 368, 255 P. 364 (1927) (notice of claim specifically describing alleged improper construction of sidewalk, distinguishing Hanan and Mears).

The requirement for a definite description of tortious conduct appears to be settled in Washington since the cases cited above, .³ Cases from other jurisdictions with similar statutory schemes that evince the same purpose compel a determination that Plaintiffs' Claim, which fails to describe any tortious conduct whatsoever, falls far short of any conceivable compliance with RCW 4.96.020(3).

In Ross vs. City of New London, 222 A.2d 816 (Conn. 1966), a sidewalk fall claim, the claim statute required notice of "the injury and a general description of the same and of the cause thereof and of the time and place of its occurrence." Id. at 817. The claim listed the street address and stated: "The claim is that the fall was caused by the neglect of the city in the maintenance and repair of the sidewalk at said site." Id. Recognizing the purpose of the statute was "to enable the municipality to make a timely and appropriate investigation of the place where the injury allegedly occurred, for the protection and preservation of the interests of the municipality," the claim was held fatally insufficient:

When we turn to a consideration of the notice of injury given in the case at bar, it becomes immediately apparent that it fails to specify the defect in the highway which resulted in injury to the plaintiff. 'The cause of the injury required to be stated must be interpreted to mean the defect or defective condition of the highway which brought about the injury. . . . What exactly was the neglect of the city in the maintenance and repair of the sidewalk in front of the

³ Caron (discussed in Renner) appears to be the most recent treatment of this subject.

premises at 122 Vauxhall Street which brought about the injuries claimed by the plaintiff? Was it a large, small or medium hole, a ditch, a gully, a rut, a depression, or the elevation of a portion of the sidewalk, or perhaps the failure of the city effectively to remove snow or ice accumulated thereon? What was the city to look for in the protection and preservation of its interests and to enable it properly to prepare a defense, if any, against the claim of the plaintiff? Certainly, the use of the words "neglect," "maintenance," and "repair" gives no clue whatsoever as to the direct cause of the fall in question, nor do the words give any indication of that which occasioned or produced the fall.

Ross, 222 A.2d at 818 (emphasis added).

Other cases similarly hold that specification of culpable conduct is required in order to serve the purpose of such claims statutes, i.e. to allow adequate opportunity to investigate and evaluate the merits of the claim: City of Louisville vs. O'Neill, 440 S.W.2d 265, 266 (Ky.App. 1969) (trip on uneven sidewalk, statute required statement of "the character and circumstances of the injury." Held: claim merely stating in conclusory fashion that at specified address "injuries were brought about by defects in the sidewalk and negligent maintenance by the City of Louisville of the sidewalk" did not comply with the statute because it "did not specify in what way the street was defective."); Collins vs. City of Meridian, 580 A.2d 549, 550 (Conn. 1990) (claim for injuries from "a defective and improper condition of the sidewalk" at specified address held insufficient to comply with statute requiring information "including the cause of the

injury": "a description of the cause of injuries as a defective and improper condition on a sidewalk ...clearly lacks the specificity to permit a respondent's intelligent inquiry. In short, the court finds that the notice fails to pass the threshold test of validity in that it is patently vague as to... the cause...of the injury."); Altmayer vs. City of New York, 149 A.D.2d 638, 639-640, 540 NYS2d. 459, 460 (1989) (automobile collision; statute required description of "the time when, the place where and the manner in which a tort claim against the city arose,"; "The requirements of the statute are met when the notice describes the accident with sufficient particularity as to enable the defendant to locate the defect, conduct a proper investigation, and assess the merits of the claim.... The plaintiff's notice of claim simply stated in ambiguous terms where a collision, claimed to be the result of the city's negligence, occurred. It failed to adequately set forth the location of the alleged act of negligence, as well as what the act of negligence was and how it caused the injuries claimed. Accordingly, the notice of claim is facially insufficient..."); DiMenna vs. Long Island Lighting, 209 A.D.2d 373, 374-375, 618 NYS2d 425, 427 (1994) (pedestrian struck by automobile. Statute required written notice setting forth "the nature of the claim" and "the time when, the place where and the manner in which the claim arose." Held: notice of claim merely stating claimant was "struck by an automobile due to, among other things, the

negligence, carelessness, and recklessness of the Town of Islip in the creation, operation, and maintenance of said roadway" was insufficient because it was "utterly silent regarding causation, i.e., the nature of the defect which allegedly caused plaintiff to be injured, and that fact alone made it impossible for the Town to conduct its investigation' .").

Plaintiffs' Claim falls far short even of the facts in the foregoing cases finding the claims insufficient, because Plaintiffs' Claim makes no statement whatsoever (even in a broad, conclusory fashion) that the County acted tortiously in any way.

The County was, and is, not required to guess among the universe of possibilities why it might be liable in tort. Cf. Kirby vs. Tacoma, 124 Wn.App. 454, 469-470, n. 12, 98 P.3d 827 (2004) ("notice of claim" stating intent to assert "constitutional tort claims" under state and federal constitutions, argued to be incorporated by reference into complaint, "failed to provide the City adequate notice of the nature of the claims against which it would have to defend.... The variation among potential constitutional tort claims is significant.... The City should not be required to guess against which claims they will have to defend."). Plaintiffs' Claim merely stated the vehicle went out of control and hit a guardrail, the "guardrail split in half and pierced through the van," and that passengers suffered injury. Plaintiffs' provided no information whether their Claim

was based upon any alleged County conduct that caused the vehicle to lose control, or caused the guardrail to split and penetrate the van, or how these events contributed to any injury.

Among myriad possibilities Plaintiffs' Claim is silent regarding the following: what caused the vehicle's loss of control resulting in impact and injury? Was it anything other than the negligence of the person operating the vehicle? Was it improper design of the road? Was it the absence of appropriate signs or roadway markings? Was it improper road maintenance? How and why did the guardrail split? Were the guardrail design limits exceeded or not? Was the design of the guardrail or its placement improper? Were improper or defective materials used in the construction of the guardrail? Were the materials in the guardrail defective, and if so, how were they defective? What knowledge did the County have of any defect? Was the guardrail installation improper? Had the guardrail been improperly maintained? Did the guardrail directly cause physical injury or was it merely a factor in the dynamics of the post-impact movement of the vehicle and its occupants?

Given the absence of any description of the nature of the claimed tortious acts or omissions in the Claim, how was the County to investigate and evaluate the nature of any tortious conduct and its potential exposure? Mr. Peterson stated the Claim "provided no information" as to the liability

theories against the County. The failure to provide this crucial information concerning claimed deficiencies in the roadway and/or guardrail precludes Plaintiffs' lawsuit:

This conclusion is not inconsistent with our holding in Caron.... In that case, we held that the claimant did not substantially comply with the claim filing requirements when she failed to include several pieces of requested information, including not only the amount of her damages, but also a description of her injury or a description of the defect causing the accident. We emphasized the claimant's failure to provide correct information regarding the equipment defects underlying her accident. The claim in Caron failed to fulfill the purpose of the statute; it did not provide the County with the information necessary to investigate the claim.

Renner, 168 Wn.2d at 548 (emphasis added).

The facts, reasoning and result in Caron, Hanan, Mears and other authorities are directly applicable. Plaintiffs' Claim merely stated that after losing control, upon impact the "guardrail split in half and pierced through the van." This is similar to the insufficient claim in Caron describing plaintiff "was on a ladder extracting a file case when the case failed to hold causing the ladder to slip and the said Blanche Caron to fall." In neither situation (unlike the more detailed allegations of the subsequently filed complaints) was there any specification of wrongful conduct for which the County could be liable. Even Plaintiffs' Complaint fails to provide anything more than vague, conclusory allegations.

In fact, it should be noted that RCW 4.96.020(3) requiring a description of "tortious conduct," is more demanding than the "defect" description requirements in Caron and Hanan because mere evidence of a defect would not be sufficient to establish tort liability. An equipment failure in and of itself is insufficient to raise an inference of tortious conduct. Tinder vs. Nordstrom, 84 Wn.App. 787, 793-794, 929 P.2d 1209 (1997) (elevator malfunction insufficient in and of itself to raise inference of negligence); Adams vs. Western Host Inc., 55 Wn.App. 601, 606, 779 P.2d 281 (1989) (equipment failure can occur without negligence being involved); see, Goldfarb vs. Wright, 1 Wn.App. 759, 762-765, 463 P.2d 669 (1970) (sudden brake failure justification defense must be supported by evidence of specific brake defect). The mere fact the guardrail split falls far short of providing any information about a potential defect, much less any "tortious conduct" by the County.⁴ The absence from Plaintiffs' Claim of the tortious conduct claimed is analogous to the overbroad

⁴ Plaintiffs now argue a *res ipsa loquitur* theory not asserted below, citing Curtis vs. Lein, 169 Wn.2d 884, 239 P.3d 1078 (2010). (App. Brief p. 20). "Matters not argued at the trial level may not be argued on appeal." Lewis vs. Mercer Island, 63 Wn.App. 29, 31, 817 P.2d 408 (1991). In any event the simple collapse of a dock used by a single person under a pleaded theory of negligent maintenance is much different than a pre-suit claim for an out-of-control vehicle operated by a third-party driver (one instrumentality) striking a guardrail (a different instrumentality) with enough force to cause it to split without any identified tortious conduct. *Res ipsa loquitur* has no application where the accident may have been the combined result of concurrent or independent acts of persons or instrumentalities. Morner vs. Union Pacific, 31 Wn.2d 282, 294-297, 196 P.2d 744 (1948). Furthermore, equipment failure can occur without negligence being involved. Adams, 55 Wn.App. at 606.

reference to the claimant's residence as the "State of Alaska" in Nelson which was held insufficient. 69 Wn.2d at 728-729. ("There was no attempt to give any meaningful information.").

The County was not required to investigate and evaluate this matter in such a vacuum. Plaintiffs had to provide the required threshold information. " 'The notice filed must actually accomplish[] its purpose of notice....' " Brigham, 34 Wn.2d at 789. No information could be more essential than a description of the tortious conduct that would render the County liable for the claimed injuries.

I. PLAINTIFFS NEVER ASSERTED AN INABILITY TO PROVIDE MORE DETAILED INFORMATION; THIS ARGUMENT IS IMPROPERLY RAISED FOR THE FIRST TIME ON APPEAL.

Plaintiffs never argued below that they were precluded from giving more detailed information that would have complied with the statute in a timely fashion.⁵ Rather, Plaintiffs argued to the trial court they were not

⁵ Plaintiffs now argue, without any support in the record, that they "provided all the information available regarding how the injury occurred," were "unable to provide further details of the defect causing injury," and were "prevented from investigating the nature of the defect in the guardrail." (App. Brief pp. 18, 20, 30). In the trial court plaintiffs made no factual assertion, explanation, or argument that further description of the County's tortious conduct could not have been timely provided. An appellate court will not consider factual assertions not supported with reference to the record. Sherry vs. Financial Indemnity, 160 Wn.2d 611, 615, n.1, 160 P.3d 31 (2007); RAP 10.3(6). Not having raised the issue below, plaintiffs may not now assert this on appeal. Lewis, supra. Rather, at all times plaintiffs' argument below was that the Claim was adequate. Plaintiffs may not make this new inconsistent assertion on appeal. Kohl, 12 Wn.App. at 373.

required to "[litigate]... the merits of one's case in the initial tort claim paperwork," the Claim "substantially complied with the main purpose of the claims statute," the Claim "clearly describes the conduct and circumstances which caused the injury or damages," and that in any event the September 29 (less than four weeks after the statute of limitations expired) "detailed telephone conversation" "specifically told" Mr. Peterson of "[p]laintiff's theory of the case was 'that... the guard rail was improperly installed or maintained.'" (CP 32-33, 35; RP 11 ll. 15-16). In fact, Mr. Childers claimed to have provided the basis of the claim to Mr. Peterson in that post-statute of limitations phone call. (CP 29, 72-73). That Plaintiffs were required to provide such information in the Claim within the statute of limitations is no more of a hardship than being required to have a factual basis for filing allegations in a complaint.

J. INFORMATION PROVIDED OR GATHERED BEYOND THE FOUR CORNERS OF THE CLAIM IS IRRELEVANT IN DETERMINING CLAIM COMPLIANCE.

The County's informal request for Plaintiffs' treatment records after the Claim was filed and prior to suit does not obviate Plaintiffs' requirement to comply with the statute. See, Kleyer vs. Harborview, 76

Plaintiffs did represent in August 2008 they had previously retained an expert who had been to the accident scene but desired depositions of County personnel (which they never scheduled); no assertion of an inability to provide their tortious conduct theories in the Claim to the County was made. (CP 25-26, 72-73).

Wn.App. 542, 549, n. 6, 887 P.2d 468 (1995) (statutory compliance is a prerequisite to commencement of an action, not initiation of investigation or settlement negotiations). “Proceed[ing] to investigate the validity of the claim... [is] not inconsistent with the requirements of RCW 4.96.020.”

Pirtle vs. Spokane Public School District, 83 Wn.App. 304, 310, 921 P.2d 1084 (1996). Compliance is required even if it would have been a futile act. Kleyer, 76 Wn.App. 547-548, n.4; Burnett vs. Tacoma, 124 Wn.App. 550, 560, 104 P.3d 677 (2005); Lewis vs. Mercer Island, 63 Wn.App. 29, 35, 817 P.2d 408 (1991) (that city was generally familiar with the claim did not excuse noncompliance.).

The single post-claim, post-suit (and post-statute of limitations) telephone conversation between counsel for the Plaintiffs and the County is irrelevant to whether the Claim substantially complied with the statute. If post-claim filing conduct were able to cure Plaintiffs’ failure to describe any tortious County conduct in their Claim, the claim filing statute (and years of case law) would be rendered a nullity. “Such a rule would totally subvert and undermine the purpose of the statute.” Cf. Lewis, 63 Wn.App. at 35 (familiarity with claim independent of written claim contents not an excuse for noncompliance). That Plaintiffs argue Mr. Childers stated information providing the basis for their claim to Mr. Peterson in the post-

suit phone conversation that was not contained in the Claim underscores the Claim's failure to comply with the statute.

K. NO WAIVER OF THE DEFENSE HAS OCCURRED.

Plaintiffs cite no tenable authority for the proposition that the defense of failure to comply with the claims statute has been waived. The authorities cited by the Plaintiffs all involve post-suit egregious conduct, lying in wait, or substantial litigation making the application of the defense unfair.

1. The Claim Statute Requirements Cannot Be Waived, At Least Pre-Suit.

A County official does not have the power or authority to disregard the substantial compliance requirements of the claim statute. Caron, 18 Wn.2d at 406-410 (County officials who affirmatively represented to the claimant that the claim was sufficient could not, as a matter of law, waive statutory compliance). Later cases applying a waiver analysis have not addressed this aspect of the Caron holding. At a minimum, the pre-suit interactions between the County and Plaintiffs' counsel cannot waive the claims statute requirements.

2. Even If A Waiver Inquiry Is Appropriate, Waiver Has Not Occurred.

Prior to the spring of 2010, Plaintiffs' only effort to prosecute any claim against the County was to file their deficient Claim in April 2008, inquire about the guardrail or any photographs in May 2008, file and serve their complaint in August 2008 (less than 20 days prior to the expiration of the three-year statute of limitations), and a brief telephone conversation several weeks after the statute of limitations expired. The County's inaction in this matter cannot be a waiver of the claim statute defense because there had been no substantial litigation, nor any other dilatory or inconsistent conduct by the County. After service of process Plaintiffs' counsel never asked for an answer to be filed or moved for default, made no inquiry concerning applicable defenses, never issued or participated in any discovery, nor engaged in any other activity on their claim against the County other than an isolated phone call after the statute of limitations had run.

Waiver can occur in two ways: if the defendant's assertion of the defense is inconsistent with previous behavior, or the defendant has been dilatory in asserting the defense. Lybbert vs. Grant County, 141 Wn.2d 29, 39, 1 P.3d 1124 (2000). Either approach requires a showing of prejudicial, unfair, misleading conduct, or substantial litigation unrelated to the

defense. Brevick vs. Seattle, 139 Wn.App. 373, 381-382, 160 P.2d 648 (2007).

a. Mere delay does not constitute a waiver.

However, "[m]ere delay" in asserting a defense, without more, does not constitute a waiver. French vs. Gabriel, 116 Wn.2d 584, 593-594, 806 P.2d 1234 (1991) (distinguishing "flagrant" situations where a defendant repeatedly asks for more time to file an answer and pointing out plaintiffs can always file a motion for default); Gerean vs. Martin-Joven, 108 Wn.App. 963, 973, 33 P.3d 427 (2001) (service defense properly raised after statute of limitations expired where no general discovery occurred); Pirtle, 83 Wn.App. at 306 (1996) (noncompliance with 4.96.020 not waived where answer filed late after interrogatories had been issued, defense counsel met with plaintiff and a human factors expert at the accident scene, and defendant requested the discovery responses; "substantial litigation" had not occurred before noncompliance defense was raised); In re Tsarbopoulos, 125 Wn.App. 273, 287-288, 104 P.3d 692 (2004) (no waiver of service defenses where defendant did not engage in discovery or file responsive pleadings prior to asserting the defense almost one year after service.).

This is especially true where the County's answer was not due before September 11, 2008, more than a week after the time when Plaintiffs might have cured the Claim's failure to comply with RCW 4.96.020 within the statute of limitations. Oltman vs. Holland America, 163 Wn.2d 236, 246-247, 178 P.3d 981 (2008) ("the timing of the complaint in state court left too little time to correct the filing mistake in any event."; answer asserting affirmative defense did not waive the affirmative defense even had the answer been filed within 20 days as the time for curing the defect had already expired; discussing Lybbert waiver analysis).

b. There has been no substantial litigation or flagrant inconsistent or dilatory conduct.

The waiver cases cited by Plaintiffs are distinguishable as they involve substantial litigation and/or "flagrant" inconsistent or dilatory conduct. Lybbert vs. Grant County, 141 Wn.2d 29, 1 P.3d 1124 (2000) is distinguishable as waiver of the insufficient service defense was predicated upon the following occurring before the statute of limitations expired: the county's issuance of interrogatories, requests for production and request for statement of damages shortly after appearing, insurance coverage and mediation discussions, representations that an answer to the complaint

would be provided "as soon as possible," plaintiffs' issuance of interrogatories and request for production specifically inquiring about service of process defenses, contact by county personnel inquiring about the type of information being requested in plaintiffs' interrogatories, the county's assurances that it would fully cooperate in providing all requested discovery information, plaintiffs furnishing responses to the county's discovery requests, the county did not respond to plaintiffs' discovery inquiring about defenses, and the county only filed an answer asserting the defense after the statute of limitations expired. Id. at 32-33, 41-42, 44 (recognizing the French rule that "mere delay in filing an answer does not constitute a waiver."). Of "particular significance" in Lybbert was that had the discovery been timely answered the plaintiffs would have had time to cure the defects in service, such conduct constituting "lying in wait." Id. at 42, n. 7.

Romjue vs. Fairchild, 60 Wn.App. 278, 279-282, 803 P.2d 57 (1991), is also distinguishable (prior to expiration of statute of limitations defendant issued discovery unrelated to the defense and requested a statement of damages, letter from plaintiff counsel to defense counsel expressly reciting an understanding that the defendants had been served and enclosing interrogatories and request for production to the defendants without response from defendants pointing out counsel was mistaken;

plaintiff counsel was unaware of the defense as affidavit of service was proper on its face). Plaintiffs' other cited cases are similarly distinguishable: Raymond vs. Fleming, 24 Wn.App. 112, 113-115, 600 P.2d 614 (1979) (repeated requests for extension of time to file answer to complaint and to respond to interrogatories prior to expiration of statute of limitations, followed by two requests for continuance of a motion to compel the same, waived insufficient service of process defense); Brevick, 139 Wn.App. at 377, 381-382 (lawsuit commenced, answer filed admitting compliance with claims statute, followed by 18 months of litigation including depositions, written discovery and CR 35 examinations; non-suit taken followed by refiling of complaint where noncompliance with claims statute defense first raised).⁶

Plaintiffs' other cited cases involved substantial litigation inconsistent with the assertion of the defense which is not present here: Miotke vs. City of Spokane, 101 Wn.2d 307, 337, 678 P.2d 803 (1984) (failure to comply with claim statute defense waived where over three years of active litigation had been completed: transfer of venue, consolidation of actions, several months of hearings on injunction and

⁶ Dyson vs. King County, 61 Wn.App. 243, 809 P.2d 769 (1991), cited by Plaintiffs, is factually and legally inapposite. Dyson involved the defendant's failure to raise the claims statute defense in its answer (filed prior to the statute of limitations running) under a CR 9(c) condition precedent analysis, and the court applied an estoppel analysis. Id. at 245-246. Here, the County raised the defense in its answer (CP 79) which was not due until after the statute of limitations ran, and Plaintiffs do not argue estoppel, but waiver.

liability issues, entering findings and conclusions, and subsequent preparation for the damages phase); King vs. Snohomish County, 146 Wn.2d 420, 423-426, 47 P.3d 563 (2002) (waiver of claim filing defense where "45 months of litigation and discovery" including 18 depositions, defendant objected to interrogatory directed to the defense, cross motions for summary judgment on issues unrelated to the defense, mediation, and seeking dismissal three days prior to trial; conduct involved "extensive, costly, and prolonged discovery and litigation preparation", "significant expenditures of time and money had occurred... at a time when [plaintiffs] could have remedied the defect.").

None of these cases hold that mere delay in asserting a defense constituted a waiver; rather more was required. "Inaction alone... does not constitute an inconsistent admission, statement or act." Mercer vs. State, 48 Wn.App. 496, 497, 739 P.2d 703 (1987). "Nothing in the rule or the state cases supports the conclusion that asserting an affirmative defense in an untimely answer constitutes waiver." Oltman, 163 Wn.2d at 244.

Unlike the Lybbert and Romjue cases, Plaintiffs cannot establish any unfair dilatory conduct by the County which misled or misdirected the Plaintiffs prior to the expiration of the time for them to file a Claim that complied with the requirement to describe tortious conduct of the County that brought about their injuries. Plaintiffs at no time made any inquiry

concerning the adequacy of the Claim; whether or not the Claim was sufficient would have been just as apparent to Plaintiffs who prepared it - compare Romjue (where insufficiency of service was not immediately apparent to plaintiff) with Meade vs. Thomas, 152 Wn.App. 490, 495, 217 P.2d 785 (2009) (where the absence of an affidavit of service was self-evident to plaintiff's attorney) and Streeter-Dybdahl vs. Huynh, 157 Wn.App. 408, 417, 236 P.3d 986 (2010) (declaration of service defective on its face).

Furthermore, the County was under "no affirmative obligations" to advise or otherwise ensure Plaintiffs "complied with the filing requirements." Pirtle, 83 Wn.App. at 310; see, Streeter, 157 Wn.App. at 990 (defendant under "no duty to assist the process server"). Having filed their Claim on April 4, 2008, Plaintiffs could have filed and served suit after 60 days from that date (June 4, 2008) and at the same time issued discovery inquiring about any claim defenses. An answer to the complaint could have been required within 20 days of service (June 24) to identify any asserted defenses, CR 12(a), and discovery responses would have been due within 40 days, i.e., by July 14. CR 33 (a). This would have given Plaintiffs more than a month within which to further investigate and before the statute of limitations ran on September 2, 2008, refile a Claim that properly described the conduct and circumstances they believe rendered

the County liable in tort for the claimed injuries. (Compare, Lybbert, where timely discovery answers would have still given plaintiff "several days" to cure the defect; Romjue, where response to opposing counsel's letter attempting to confirm proper service would have allowed cure; Meade, where an answer asserting insufficient service defense was filed leaving time to cure). Plaintiffs cite no authority for the proposition that an answer more than 20 days after service, in and of itself, waives a defense where the answer was not due until after the time for curing the defect providing the basis for the defense had passed.

Instead Plaintiffs delayed over eight weeks to serve the County on August 22, 2008, the latest cure date was September 2, 2008, but an answer was not required at the earliest until September 11, 2008. Because Plaintiffs delayed litigating their claims until it was too late to cure their failure to describe any tortious conduct by the County, there was no unfair dilatory conduct by the County constituting a waiver. Alleged delay occurring after a required deadline cannot form the basis for a waiver of a defense where the plaintiff could not have cured the defect in any event. Oltman, 163 Wn.2d at 246-247 (answer asserting affirmative defense did not waive the affirmative defense where even had the answer been filed within 20 days the time for curing the defect had already expired; discussing Lybbert waiver analysis).

Nor was there any significant expenditure of time, money or resources by Plaintiffs that could be argued to constitute a waiver, either before September 2, 2008, when cure could have been effected, or at any subsequent time. Meade, 152 Wn.App. at 492-95 (defendants' issuance of a single set of interrogatories unrelated to defense of insufficient service of process, coupled with a follow-up e-mail and correspondence on status of discovery answers and asking about scheduling plaintiff's deposition, followed by plaintiff furnishing unsigned copy of discovery responses, did not constitute "extensive" discovery sufficient to waive defense). Compare, King, supra (significant expenditures when defect could have been remedied).

Pre-suit the only inquiry by the County consisted of two letters written to the Plaintiffs' attorneys on May 29 and July 22, 2008, requesting copies of medical and/or treatment records "to assist in our review of this claim." Plaintiffs never responded to this inquiry. Such inquiry is not a waiver. Pirtle, supra; Meade, supra. Furthermore, such letters (written prior to suit) could not constitute engaging in "discovery" inconsistent with the assertion of the defense. After filing suit on August 8, 2008, and serving the County on August 22, 2008, Plaintiffs can point to no conduct by the County inconsistent with assertion of lack of compliance with the claims statute Prior to September 2, 2008.

Post-suit the only activity in the lawsuit was a single September 29, 2008 conversation between Mr. Childers and Mr. Peterson weeks after the time to comply with RCW 4.96.020 had expired. As such, that conversation alone could not constitute a waiver. Oltman, supra. Even to the extent conduct occurring after September 2, 2008 could be relevant to the issue of waiver, it must constitute "substantial litigation." Brevick, 139 Wn.App. at 381-382. (discussing substantial litigation as an element of both the dilatory conduct and inconsistent conduct approaches). Neither party issued or provided any discovery in this case (much less inquiring either formally or informally about any claim notice defenses), took any depositions, conducted any settlement negotiations, or had any other contact concerning the claims against the County prior to the County raising the claim notice defense. Informally investigating the validity of a claim is "not inconsistent with the requirements of RCW 4.96.020." Pirtle, 83 Wn.App. at 310; Meade, supra (mere issuance of discovery and letter inquiring about taking depositions insufficient activity to constitute a waiver, distinguishing Lybbert). Nor do Plaintiffs' claim (either factually or legally) that Mr. Peterson misled them to their detriment.⁷

⁷ Plaintiffs' assertion that such *de minimus* conduct constitutes holding oneself out as "going forward" is directly inconsistent with the more extensive conduct in Pirtle and Meade which was held not to constitute a waiver. Pirtle, 83 Wn.App. at 306, 310-311 (discovery issued by defendant, defendant met at scene with plaintiff and a human factors expert, and defendant requested answers to discovery); Meade, 152 Wn.App. at 492-495

CONCLUSION

The ruling of the trial court should be affirmed. Plaintiffs' Claim failed to substantially comply with the requirements of the claim statute because it failed to describe any "tortious conduct" of the County that brought about their injuries. The Claim set forth nothing more than that an accident occurred and the plaintiffs were injured. No "tortious conduct" on the part of the County was anywhere described or alleged, unlike the more specific (but still insufficient) conclusory allegations in the Complaint filed four months later asserting negligent design, negligent maintenance, negligent operation or negligent management of the guardrail.

Furthermore, there was no waiver of the defense based upon Plaintiffs' failure to comply with the claim statute. There was no unfair dilatory conduct by the County and no "substantial litigation" at a time when the claimed defect could have been corrected (or at any other time for that matter). The lack of any activity in this case stands in stark contrast to the substantial litigation that has amounted to a waiver of a defense in other cases.

(discovery issued by defendant, 2 follow-up requests on status of answers and requesting plaintiff's deposition, and plaintiff sending unsigned discovery responses). If ever there was a case of "mere delay" not constituting waiver, this is such a case. That Plaintiffs regard the (lack of) conduct here as "going forward" with the case probably explains more about their own culpable inactivity in this matter than anything else.

RESPECTFULLY SUBMITTED this 3rd day of January, 2011.

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CERTIFICATE OF SERVICE

I hereby certify under penalty of perjury under the laws of the state of Washington that the following is true and correct to the best of my knowledge:

At all times herein mentioned the undersigned was and now is a citizen of the United States, and a resident of the State of Washington, and over the age of majority; that the undersigned is not a party to the above-entitled action nor interested therein.

That on January 3, 2011, the undersigned sent via U.S. Mail, First Class, postage prepaid, a true and correct copy of Brief of Respondent County of Yakima to:

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DATED this 3rd day of January, 2011, at Yakima, Washington.


KATHY MARUGG